

1992

Smith Marketing Group and Hugh B. Smith v. Larae Kunz : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

SMITH MARKETING GROUP, INC., :
and HUGH B. SMITH, :

Plaintiffs and Appellants, :

vs. :

LARAE KUNZ, :

Defendant and Appellee. :

Appellate Court No. 92-0814-CA
Priority 15

APPELLEE'S BRIEF

This Appeal is from a Judgment
of the Third Judicial Circuit Court, Salt Lake County,
the Honorable Judge Philip K. Palmer

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STATEMENT OF JURISDICTION

Rules 3 and 4 of the Utah Rules of Appellate Procedure confer jurisdiction on this Court to hear this Appeal.

ISSUE PRESENTED FOR REVIEW

Was the clear weight of the evidence sufficient to justify the trial court's finding that the Plaintiffs and Appellants, Smith Marketing Group, Inc. and Hugh B. Smith (Hugh) did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement.

STANDARD OF REVIEW

Under Utah R. Civ. P. 52(a), the trial court's Findings of Fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

DETERMINATIVE STATUTE

The determinative statute for this appeal is Utah R. Civ. P. 52(a) Findings by the court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

STATEMENT OF THE CASE

1. Hugh sued LaRae Kunz (LaRae) for a five percent (5%) real estate broker's fee (\$8,000.00), attorney's fees and costs for an alleged breach of a Buyer-Broker Agreement. LaRae claimed that Hugh failed to perform the "broker's obligations" contained in paragraph 3 of the Agreement.

2. The case was tried without a jury before the Honorable Philip K. Palmer, Third Circuit Court Judge on September 23, 1992.

3. The trial court found that Hugh did not fully comply with his obligation under paragraph 3 of the Agreement, but found that he did perform services for LaRae that benefitted her and awarded judgment to Hugh in the amount of \$4,000.00 under the doctrine of partial performance or equitable relief as a fair and reasonable fee for the services rendered.

FACTS

1. On January of 1991, LaRae was employed with American Express in New York City as a director in the finance group. American Express transferred her to Utah. (R 291)

2. LaRae told her friend Dr. Pearl of the transfer to Utah and Dr. Pearl indicated that he had a friend, Dr. Robert Pease, who owned a home in Utah that may be for sale. (R 291, 292)

3. LaRae's friend, Lonnie Dietz, referred her to Hugh whereupon LaRae called Hugh and told him that she had been referred to him by Lonnie Dietz and that she was going to be relocating to Salt Lake City and would be interested in finding a house. (R 292)

4. After arriving in Salt Lake City on February 24, 1991, LaRae spoke with Dr. Pease and indicated that she understood he had a home he was selling and sought further information from him. Dr. Pease told LaRae the home was difficult to describe, that its the sort of home she would need to see and arrangements were made for LaRae to see the home. (R 293)

5. Dr. Pease subsequently told LaRae that the home had not been listed because Dr. Pearl had contacted him and told him that LaRae would be interested in it. Dr. Pease excluded LaRae with the realtor with whom he was going to have the home listed. (R 294)

6. On February 28, 1991, Hugh picked LaRae up at her hotel and they proceeded to visit Dr. Pease's home in Emigration Canyon and thereafter looked at other homes. (R 264)

7. LaRae and Hugh met Dr. Pease at his home on February 28, 1991, and LaRae knew immediately that she loved the home and would enjoy living in it. Dr. Pease told LaRae that the purchase price of the home was \$175,000.00. (R 293, 294)

8. LaRae was not aware that Dr. Pease stated he would not pay a commission prior to March 2, 1991, the date she purchased the home. (R 264, 313, 314)

9. Dr. Pease adamantly asserted to Hugh that he would not pay a commission on the sale of his home and Hugh advised Dr. Pease that he understood that the home wasn't listed and that he wasn't paying a commission. (R 189)

10. LaRae was thrilled with the home. (R 232)

11. Hugh tried to dissuade LaRae from buying the home. (R 233)

12. In Hugh's efforts to dissuade LaRae from buying the home he expressed that he was dissatisfied with the asking price, it was unusual in that it was in the canyon, it didn't have a sewer system, it was not part of a normal city subdivision, it was built close to a steep hill, it had a creek by it and had had some erosion in the past, winter road conditions may

cause difficulties, it was close to an incline with little vegetation on the slope, septic system concerns, accessibility and snow conditions. (R 187, 191, 192, 193, 194)

13. After having expressed his reservations about the purchase price and other perceived problems with the property, Hugh met with LaRae on March 2, 1991, at which time LaRae signed the Buyer-Broker Agreement. (R 300)

14. Hugh and LaRae also prepared an Ernest Money Sales Agreement which provided that Dr. Pease would pay Hugh a commission of three percent (3%) of the sales price at closing with the remainder of the commission to be paid by LaRae. (R 300)

15. On the evening of March 2, 1991, Hugh delivered the Ernest Money Sales Agreement to Dr. Pease. (R 300)

16. When Hugh presented the offer to Dr. Pease, Dr. Pease was dissatisfied and visibly upset. (R 211)

17. Dr. Pease reiterated to Hugh that no real estate agents were to be involved in the transaction, that he was not going to pay a commission, and that he didn't want Hugh involved in the transaction at all. (R 211, 212)

18. Dr. Pease told Hugh that he found it repugnant that after having told him twice not to assert a commission, that he nevertheless proceeded to do so in this transaction. (R 332)

19. Dr. Pease advised Hugh that he wasn't welcome on his property and that he was forbidden to have anything to do with the sale of his home. (R 333, 334)

20. On the evening of March 2, 1991, Hugh telephone LaRae and advised her

that Dr. Pease had been upset by the language in the offer, but that he had not accepted or rejected it and he would get back to LaRae. (R 301)

21. On March 5, 1991, LaRae returned Hugh's call and he advised her that Dr. Pease was very upset and that he didn't want Hugh to have anything to do with the arrangements. Hugh suggested that LaRae call Dr. Pease to calm him down because Dr. Pease had indicated that he would like to speak with LaRae directly. (R 301)

22. LaRae called Dr. Pease on March 5, 1991, and inquired why he was upset. Dr. Pease told her that Hugh had filled out the offer incorrectly, that Dr. Pease had specifically advised Hugh that LaRae should have been excluded from the listing and that no commissions would be paid to Hugh by Dr. Pease. (R 302, 303)

23. LaRae called Hugh, expressed her confusion and stated she didn't understand why Dr. Pease was so upset. LaRae explained to Hugh that she wanted the house, that she felt the offer had been jeopardized because Dr. Pease indicated and that he would not consider her continued efforts to purchase the house. LaRae explained to Hugh that she wanted the house, and that she would have to discuss the matter with Hugh when she returned to Salt Lake City, but felt that Hugh's services would no longer be needed. (R 303, 304)

24. LaRae advised Dr. Pease that she was still interested in the house, that her first priority was that she did not want to lose the sale, and that she would like to continue to negotiate with him by herself. (R 304)

25. LaRae became upset and frustrated because Dr. Pease was disgruntled, Hugh had known how much she had wanted the home, she knew she had to move from New

York City to Salt Lake City and had to find something soon and that she had to prepare for the move. (R 309, 310)

26. LaRae was upset that Hugh had a conflict with Dr. Pease and upset him to the point that it would be detrimental to the purchase of the home because Dr. Pease had indicated that he did not want to continue negotiations. (R 310)

27. LaRae told Dr. Pease that she really loved the home, that she was sorry about what happened with Hugh and that she would like to continue the negotiations. (R 310)

28. LaRae, without any further assistance from Hugh, persisted in her negotiations with Dr. Pease and ultimately consummated the sale. (R 307)

ARGUMENT SUMMARY

1. The clear weight of the evidence reveals that Hugh breached the terms of the Agreement in that he failed to use professional knowledge and skills to negotiate for LaRae's purchase of Dr. Pease's home, and that he failed to assist LaRae throughout the transaction and act in her best interest at all times.

2. The trial court's findings of fact that Hugh did not fully comply with his obligation under paragraph 3 of the Agreement should not be set aside unless clearly erroneous and unless due regard is given to the opportunity of the trial court to judge the credibility of the testimony of LaRae, Hugh and Dr. Pease.

3. The clear weight of the evidence in the record justifies the findings of fact of the trial court that Hugh did not fully comply with his obligations under paragraph 3 of the Agreement.

4. Hugh was advised on several occasions that Dr. Pease adamantly insisted that he would not pay a commission on the sale of his property and that he did not want a realtor involved in the sale. LaRae was unaware that Dr. Pease had made this assertion. Hugh irrevocably alienated Dr. Pease when he presented the offer containing a provision for a commission.

5. Hugh jeopardized LaRae's opportunity to purchase the property, and it was only through her persistent efforts to continue negotiations with Dr. Pease that she was able to salvage the sale.

6. Hugh acted contrary to LaRae's best interest throughout the transaction in that he, knowing full well that LaRae was thrilled with the home, tried to dissuade her from purchasing the home by stressing what he perceived to be drawbacks relating to purchase price, location in Emigration Canyon, sewer system concerns, normal city subdivision concerns, proximity to steep hill, past erosion, winter road conditions, snow accumulation, and lack of vegetation on a nearby slope.

ARGUMENT

LaRae fell in love with Dr. Pease's house the first time she saw it. She exclaimed in the presence of Dr. Pease and Hugh "I love your house, I love your house." (R 293)

LaRae told Hugh that she would like to make an offer on the house, the offer was prepared and Hugh submitted it to Dr. Pease on March 2, 1991. (R 300)

Hugh was obligated under the Agreement to use professional knowledge and skills to negotiate for the purchase and to act in LaRae's best interest at all times. Paragraph 3 of the

Agreement provides:

BROKER'S OBLIGATIONS: The Broker will: (a) use diligence in locating a property acceptable to Buyer; (b) use professional knowledge and skills to negotiate for the purchase, exchange, lease, or option to purchase the property; (c) assist Buyer throughout the transaction and act in the Buyer's best interest at all times. (R 151)

Hugh antagonized and alienated Dr. Pease by the manner in which he submitted the first offer to the point that Dr. Pease refused to have anything more to do with him. Dr. Pease told LaRae that he was seriously considering withdrawing from the transaction with her altogether. (R 304)

LaRae was justifiably fearful that the possibility of acquiring her dream home was slipping through her fingers and she scrambled to smooth Dr. Pease's ruffled feathers to save the sale. She continued to negotiate with Dr. Pease and was ultimately successful in purchasing the home. (R 304)

The trial court found that Hugh's actions constituted a breach of the Agreement.

In its trial memorandum, the court stated:

Why Mr. Smith would prepare an offer wherein the seller would pay part of the commission when he had just been told by the seller that the seller would not work with a broker and would pay no commission is unknown. It appears to the court that, knowing of Ms. Kunz's strong desire to acquire the home, this was the very worst approach he could have made. Mr. Smith denies trying to disrupt the sale, or to keep Ms. Kunz from entering into it. He testified that he was only trying to dissuade her from paying too much, although in his deposition he does admit a desire to dissuade Ms. Kunz from buying the house. In court, Mr. Smith testified that he did not believe the commission clause in the offer would kill the sale, and he said Ms. Kunz expressed no such concern either. Of course, at the time the offer was prepared, only Mr. Smith knew of the seller's strong feelings about this. Ms. Kunz did not find out until later.

The court finds that Plaintiff's knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's strong aversion to paying a commission and dealing with a realtor, and preparing the kind of offer they submitted, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement. Also, it should be pointed out that Plaintiffs did not locate the property in question as required by that paragraph. (Addendum A)

There is ample evidence in the record that LaRae did not know that Dr. Pease had adamantly asserted that he would not pay a commission:

Q And he picked you up at the hotel on that day, you went in his vehicle, you went up and you looked at several homes but also including the Emigration home, correct?

A We looked at the Emigration home first. I know you want a yes or no answer, but we looked at the Emigration home first and then we looked at other homes afterwards.

Q Very well. Now, you immediately liked the house, you liked the setting the -- I think that's clear. You liked the way it looked. Dr. Pease showed you around, correct?

A Correct.

Q Dr. Pease at that time told you that he was not interested in paying a real estate commission, correct?

A That's incorrect.

Q That's incorrect? All right. Dr. Pease told you over the telephone, prior to your seeing the home, that he was not interested in participating or paying a real estate commission?

A That's incorrect.

Q Well, if I was to tell you that Dr. Pease in his deposition said that he told you on at least two occasions before you made an offer that he was not interested in paying a real estate commission you would say he is lying?

A I wouldn't say he was lying.

Q You would say he is incorrect?

A I would say he was incorrect. What he had actually told me --

Q Well, I'm not asking what he told you, I'm just asking you that question.

A That's correct. (R 264, 265)

LaRae further testified as follows:

A That's correct. He advised --

Q Well, I'm just asking the question. Now, he asked you to call Dr. Pease and see if you could calm him down.

A That's correct.

Q And you did?

A I did.

Q You called Dr. Pease and in fact at that time Dr. Pease told you he didn't want any real estate people involved at all.

A Right. So there was no indication --

Q There's no question pending. Now, is that your testimony that that's the first time that Dr. Pease told you that he would not share in a commission?

A. Yes. To me, that was the first time he had mentioned that. (R 275)

LaRae testified later in the trial as follows:

Q (By Mr. Branch) Did Dr. Pease tell you, prior to your making an offer on the home, that would be prior to March 2nd, the time you made the offer--it could have been on March 2nd but prior to making the offer--that I was not going to pay any commissions to a realtor if she bought the house, meaning you, and that she had no need to since we had met privately, discussed this privately between the two of us, there was no need for a commission here. And

that saved me money and it saved her money. Did he tell you that?

A He told me that in the discussion on March 5th when I called him from New York.

Q I see. Not before the offer?

A Not before the offer.

Q Did he tell you in a conversation on the phone the first time he talked to you when you mentioned Hugh Smith--that would be prior to your offer, correct?

A I didn't mention Hugh Smith on the telephone to him.

Q But he knew Hugh Smith was your agent prior to the time you made an offer, correct?

A At the time we met at the home on the 2nd.

Q All right. Did he mention to you then, prior to that time, when you first advised him that Hugh Smith was the agent involved, that there wouldn't be a realtor if she was to buy this house from me, period? Did he say that?

A I don't quite understand the question. Could you--

Q Did Dr. Pease tell you at the time that you advised him that Hugh Smith would be coming with you to the house that there was not to be a realtor involved, period?

A I do not recall that, no.

Q So if he said that under oath, he's lying or misunderstands or is confused or something, is that what your testimony is?

A I don't recall that.

Q All right. If Dr. Pease testified that the first time she--that would be you--came to our residence she was originally going to come up earlier in the day and could not get free and she called prior to coming up and asked, since the realtor and her had been looking at some other houses, would it be all right if he

just came along--do you remember him saying that to you or you saying that to him?

A No. He's confused with the time frames.

Q And that he said to you, that would be fine, as long as it's understood there's not going to be a realtor involved in this sale and if you buy this house. Did he say that?

A I don't remember that conversation, no. (R 313, 314, 315)

Although the record contains some conflicting testimony relating to the time frame within which LaRae knew that Dr. Pease would not pay a commission, the court chose to accept LaRae's testimony that she didn't know about it until after the offer was made. Utah R. Civ. P. 52(a) provides that credibility determinations are within the sound discretion of the trial court. Riche v. Riche, 784 P2d 465, 467 (Utah App. 1989) "because the trial court alone can assess the demeanor and relative credibility of the witnesses [and] is charged with the fact finding function...we accord its actions broad difference." Jacqueline v. Jacqueline, 696 P2d 1191, 1192 (Utah 1985). See Peterson v. Peterson, 818 P2d 1305, 1307-08 (Utah App. 1991) (Appellate court "gives due regard to the opportunity of the trial court to judge the credibility of the witnesses") quoting Utah R. Civ. P. 52(a).

The record reveals that there is substantial evidence to justify the trial court's findings.

VanDyke v. Chapel, 818 P2d 1023, 1024 (Utah 1991), stands for the proposition that this court views the evidence in light most favorable to the trial court's findings, and, therefore, marshals the facts consistent with that standard.

In its Memorandum Decision, the trial court also alluded to Hugh's attempts to dissuade LaRae from buying the property. (Addendum A)

Even though he knew LaRae was thrilled with the home, Hugh seemed determined to impose his prejudices regarding the price and suitability of the home on LaRae. He testified:

A We looked at the property. It was unusual property in that it was built in several phases. It was also unusual in that it was in the canyon, it didn't have a sewer system. All the homes we had been looking at before had been part of a normal city subdivision. It was built very close to a steep hill, mountain. It was on a little side road that had a creek by it and it had had some erosion in the past. They had just repaved his driveway, had done some type of work out with the yard and the creek, retaining the banks from the floods that had come several years earlier.

And so I went through the home looking for possible problems and also looking around the home for possible problems that would affect her decision to buy. I also looked at the quality of the workmanship, looked at the different additions on the home and determining what I would tell Ms. Kunz, how she could best buy the home or if she should even attempt to buy it. (R 187, 188)

Hugh testified further:

A We discussed the home and that she liked it quite a bit. We discussed some of the possible drawbacks of the home.

Q Like what?

A Like being up Emigration Canyon. LaRae was not familiar with Utah winters. She wasn't sure how that would affect her travel.

Q She was concerned about this?

A Yes, about the road conditions.

Q Was there anything else she was concerned about or you were concerned about that you both discussed?

A Yes. I was concerned about the soil. Having had wet years before and having had sides of mountains slough off, as is evident on everywhere you

drive on the highway, I was concerned having her that close to that steep of an incline with that little of vegetation on the slope.

Q Did you mention that to her?

A Yes, I did. I mentioned that and suggested that that was out of my area of expertise. I didn't know how to check for soil stability and suggested a professional, if that were a concern to her. I also--when I was at the home I talked to Dr. Pease about his lot line, where the lot went. But there were no fences and there was some question as to whether part of the amenities that he listed with his home--the satellite dish--were on his property. I suggested to LaRae that--usually, I don't suggest a professional survey, they're expensive and they're usually not needed in a subdivision. In this case, I suggested it would be a wise choice, that she should get a survey.

I also--we discussed the septic system. I had purchased a home years before with one and so I was somewhat familiar with how it works with the leech lines and everything. And so I educated LaRae about how that system works and the drawbacks and we just kind of went over everything (inaudible), drawbacks, advantages. It was really a cute home. They'd put in top quality finishing work in the home. It was away from the city and kind of private and secluded, which was a plus for LaRae. (R 191, 192)

Later Hugh testified:

Q Let me ask you before we go on to the other homes you looked at, did you talk about the price of that home with Ms. Kunz? Did she have any concerns about that?

A Yes, she did. She wondered if it was worth what they were asking. And I--I didn't know exactly what it was worth but I felt that it was quite small to be worth \$175,000. And I was concerned that the price was too high and we--she asked me to do a market analysis of the home, pulling up comparables that had sold, so that we could compare.

Q Did you agree to do anything concerning the weather concerns and traffic concerns for Ms. Kunz?

A Yes. I agreed to follow up on all of her concerns. The weather was one of them. I agreed to call the highway department, to call--also, there's Cromptons and Ruth's Diner that's up Emigration Canyon. I agreed to call them and--

Q Now, who's that?

A They're both restaurants. And I thought since they would travel the canyon every day they could give me a better idea of the snow conditions.

Q All right. You're dealing with accessibility, I assume, when you talk snow conditions?

A Yes, that she would be able to get home from work at night and get there in the morning. (R 193, 194)

Under Rule 52(a) of the Utah Rules of Civil Procedure, the trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See Peterson v. Peterson, 818 P2d 1305, 1307-08 (Utah App. 1991).

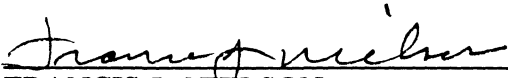
A finding of fact will be found clearly erroneous when it is contrary to the clear weight of the evidence, or if the appellate court has a "definite and firm conviction that a mistake has been made." Cummings v. Cummings, 821 P2d 472, 476 (Utah App. 1991). (State v. Bobo, 803 P2d 1268, 1272 (Utah App. 1990)). See Doelle v. Bradley, 784 P2d 1176, 1178 (Utah 1989).

CONCLUSION

The trial court correctly determined that Hugh did not fully comply with his obligations under paragraph 3 of the Agreement. Further, the court's findings of fact were not contrary to the weight of the evidence and, therefore, are not clearly erroneous. Accordingly,

this Court should affirm the judgment.

DATED this 22nd day of February, 1993.



FRANCIS J. NIELSON
Attorney for Defendant and Appellee

CERTIFICATE OF MAILING

I, Francis J. Nielson, certify that on February 22, 1993, I served two copies of the attached Appellee's Brief upon Tom D. Branch, the counsel for the Appellant in this matter, by mailing them to him by first class mail with sufficient postage prepaid to the following address:

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FRANCIS J. NIELSON
Attorney of Record

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

SMITH MARKETING GROUP, INC.)	
and HUGH B. SMITH,)	MEMORANDUM DECISION
)	
Plaintiffs,)	Case No. 913011770CV
)	
vs.)	
)	
LA RAE KUNZ,)	
)	
Defendant.)	

In this case, Plaintiffs are suing for a real estate broker's fee pursuant to a Buyer-Broker Agreement (Plaintiff Ex. #2). Defendant claims failure of Plaintiff to perform "broker's obligations" as stated in paragraph 3 of the agreement as a defense.

The property over which this lawsuit arises was not listed for sale at the time in question. Defendant learned of its availability through a mutual friend of hers and the seller's. She requested that Plaintiff Hugh Smith, who was assisting her in looking for homes that were listed, accompany her to look at the property in question.

Plaintiff and Defendant went to visit the property on February 28, 1991. When the owner discovered that Mr. Smith was a realtor, he appeared cool towards him and told him that he would not pay a realtor fee and did not want a realtor involved in the sale. Ms. Kunz liked the home and was not aware that the seller would not deal with

a realtor until several days later when she talked with the seller over the telephone. Mr. Smith had several concerns with the property, especially the asking price of \$175,000 which he considered to be too high. Ms. Kunz indicated to him that the home was just what she wanted and that she was willing to pay a little above the appraisal which was between \$150-155,000.

Accordingly, Mr. Smith prepared an "Earnest Money Sales Agreement" (Plaintiff Ex. #3) in which Ms. Kunz extended an offer to purchase the property for \$157,000 with the seller to pay 3% of the sales commission and her to assume the rest (2%). When this offer was presented to the seller, he became completely antagonized. At this point, he contacted Ms. Kunz and let her know that the only way she would get the home was if Mr. Smith were out of the picture.

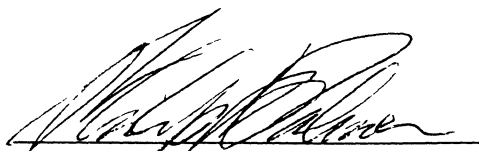
Why Mr. Smith would prepare an offer wherein the seller would pay part of the commission when he had just been told by the seller that the seller would not work with a broker and would pay no commission is unknown. It appears to the court that, knowing of Ms. Kunz's strong desire to acquire the home, this was the very worst approach he could have made. Mr. Smith denies trying to disrupt the sale, or to keep Ms. Kunz from entering into it. He testified that he was only trying to dissuade her from paying too much, although in his deposition he does admit a desire to dissuade Ms. Kunz from buying the house. In court, Mr. Smith testified that he did not believe the commission clause in the offer would kill the sale, and he said Ms. Kunz expressed no such concern either. Of course, at the time the offer was prepared, only Mr. Smith knew of the seller's strong feelings about this. Ms. Kunz did not find out until later.

The court finds that Plaintiffs, knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's strong aversion to paying a commission and dealing with a realtor, and preparing the kind of offer they submitted, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement. Also, it should be pointed out that Plaintiffs did not locate the property in question as required by that paragraph.

The court also finds, however, that Plaintiffs did perform services for Defendant that benefited her and in all likelihood enabled her to obtain the property for a better price than the amount initially asked for. (She acquired the property for \$160,000). Therefore, under the doctrine of partial performance or equitable relief, Plaintiffs may recover from Defendant a fair and reasonable fee for the services rendered. (See 17A Am. Jur. 2d 646).

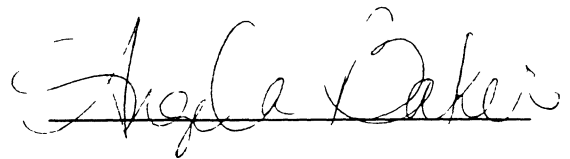
If the property in question had been listed under the multiple listing service, the probable fee Plaintiffs would have received from a successful sale of the property would be half of the agreed commission of 5%. This would be 2½ % of \$160,000, or \$4000. This is the measure of damages which the court finds the Plaintiffs are entitled to. Judgment is therefore granted for the Plaintiffs against the Defendant in the amount of \$4000. No attorney's fees or costs are awarded. The attorney for Plaintiff will please prepare the judgment pursuant to the court's decision.

Dated this 28th day of September, 1992.


Judge Philip K. Palmer
Third Circuit Court

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum Decision was mailed, postage prepaid, to Tom D. Branch, Attorney at Law, 5300 South 360 West #360, Salt Lake City, UT 84123 and Francis J. Nielson, Attorney at Law, 310 South Main Street #1305, Salt Lake City, UT 84101 this 28th day of September, 1992.


Angela Baker

TOM D. BRANCH (3997)
ZOLL & BRANCH
Attorney for Plaintiff
5300 South 360 West
Suite 360
Salt Lake City, Utah 84123
Telephone: (801) 262-1500

FILED

OCT 28 1992

Third Circuit Court
Salt Lake Department

IN THE THIRD CIRCUIT COURT
SALT LAKE COUNTY, STATE OF UTAH

SMITH MARKETING GROUP, INC.,)
and HUGH B. SMITH)

Plaintiff,)

vs.)

LaRAE KUNZ,)

Defendant.)

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND JUDGMENT

Civil No. 913011770CV

JUDGE PHILIP K. PALMER

The above-entitled matter came on for Trial before the Honorable Judge Palmer on September 23, 1992. The Plaintiffs Smith Marketing Group, Inc. and Hugh B. Smith appeared and were represented by their attorney Tom D. Branch, and the Defendant LaRae Kunz appeared and was represented by her attorney Francis J. Nielson. Following the presentation of evidence including witnesses, exhibits, arguments of counsel, and other matters before the Court, and the Court being fully advised in the premises makes the following Findings of Fact, Conclusions of Law, and Judgment:

FINDINGS OF FACT

1. Plaintiffs sued Defendant for a 5% real estate broker's fee (\$8,000.00) and attorney fees and costs pursuant to a Buyer-Broker Agreement (Plaintiff's Exhibit #2). Defendant claimed failure of Plaintiff to perform "broker's obligations" as stated in paragraph 3 of the agreement as a defense.

2. The property over which this lawsuit arose was not listed for sale at the time in question. Defendant learned of its availability through a mutual friend of hers and the seller's. Defendant requested that Plaintiff, who was assisting her in looking for homes that were listed, accompany her to look at the property in question. Defendant specifically agreed to include the subject property in the coverage of the agreement and the property is listed therein.

3. Plaintiff and Defendant went to visit the property on February 28, 1992. When the owner discovered that Mr. Smith was a realtor, he appeared cool towards him and told him that he would not pay any realtor commission and did not want a realtor involved in the sale. Ms. Kunz liked the home and was not aware that the seller stated he would not pay a realtor commission until several

days later, after the offer was submitted, when she talked with the seller over the telephone.

4. Mr. Smith had several concerns with the property, especially the asking price of \$175,000 which he considered to be too high. Ms. Kunz indicated to him that the home was just what she wanted and that she was willing to pay a little above the appraisal which was between \$150,000 to \$155,000.

5. Mr. Smith, with the input of Ms. Kunz, prepared and Ms. Kunz signed an "Earnest Money Sales Agreement" (Plaintiff's Exhibit #3) in which Ms. Kunz extended an offer to purchase the property for \$157,000 with the seller to pay 3% of the realtor commission. When this offer was presented to the seller, he became completely antagonized. At this point, he contacted Ms. Kunz and for the first time let her know that he would not pay any realtor commission.

6. Mr. Smith testified that he did not believe the commission clause in the offer would kill the sale, and Ms. Kunz expressed no such concern either. Of course, at the time the offer was prepared, only Mr. Smith knew of the seller's position about not paying any commission. Ms. Kunz did not find out of the seller's

feelings on the commission until after the offer was presented.

7. The Court finds that Plaintiffs, knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's statement concerning commissions and Defendant's ignorance of such statement, and preparing of an offer wherein the seller would pay a 3% commission in light thereof, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement.

8. The Court does find that Plaintiffs did perform services for Defendant that benefitted her and enabled her to obtain the property for a better price than the amount initially asked for. (She acquired the property for \$160,000). Therefore, under the doctrine of partial performance or equitable relief, Plaintiffs may recover from Defendant a fair and reasonable fee for the services rendered. (See 17A Am. Jur. 2d 646).

9. If the property in question had been listed under the multiple listing service, the probable fee Plaintiffs would have received from a successful sale of the property would be half of the agreed commission of 5%. This would be $2\frac{1}{2}\%$ of \$160,000.00 or \$4,000.00. This is the measure of damages which the Court finds

the Plaintiffs are entitled to. No attorney fees or costs are awarded.

CONCLUSIONS OF LAW

1. The Plaintiffs are entitled to a Judgment against the Defendant in the amount of \$4,000.00.

Based upon the above findings of Fact and Conclusions of Law, the Court enters the following:

JUDGMENT

Based upon the above Findings of Fact and Conclusions of Law which are incorporated herein, the Court orders that the Plaintiffs be granted a Judgment against the Defendant LaRae Kunz in the amount of \$4,000.00. No attorney fees or costs are awarded.

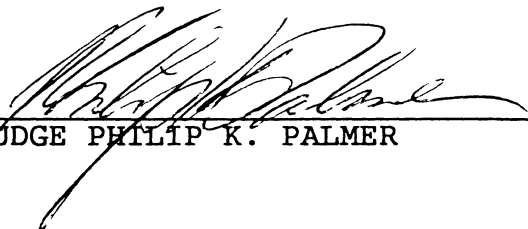
NOTICE TO DEFENDANT AND HER COUNSEL:

You will please take notice that the above and foregoing will be submitted to the Court for signature upon the expiration of five

(5) days from the date of this notice, together with three (3) days for mailing, unless written objection is filed prior to that time.

DATED this 27 day of oct, 1992.

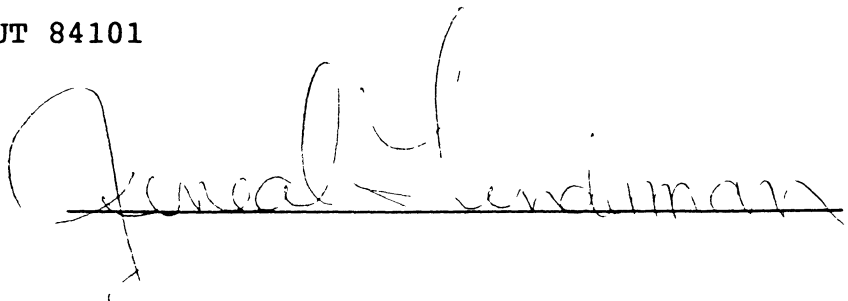
BY THE COURT:


JUDGE PHILIP K. PALMER

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing on this 9TH day of October, 1992, to:

Francis J. Nielson
Attorney at Law
310 South Main Street
Suite 1305
Salt Lake City, UT 84101



smithmar\p\fof.jud

instructions. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

Written instructions.

—**Failure to tender.**

—**Waiver.**

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fulmer v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

Cited in *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480

P.2d 462 (1971); *Flynn v. W.P. Harlin Constr. Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 166 Utah Adv. Rep. 26 (Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75A Am. Jur. 2d Trial § 1077 et seq.

C.J.S. — 88 C.J.S. Trial §§ 266 to 448.

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇌ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be

considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

Cross-References. — Masters, Rule 53.

NOTES TO DECISIONS

ANALYSIS

Adoption.

- Abandonment of contract.
- Advisory verdict.
- Breach of contract.
- Child custody.
- Contempt.
- Credibility of witnesses.
- Denial of motion.
- Divorce decree modifications.
- Easement.
- Evidentiary disputes.
- Juvenile action.
- Material issues.
- Harmless error.
- Submission by prevailing party.
- Court's discretion.
- Water dispute.
- Findings of state engineer.
- Amendment.
- Motion.
- Conformance with original findings.
- New trial.
- Notice of appeal.

- Time.
- Tolling of appeal period.
- When made.
- Overruling or vacation.
- Another district judge.
- Lack of notice.
- Child custody awards.
- Criminal cases.
- Criminal contempt.
- Effect.
- Preclusion of summary judgment.
- Relation to pleadings.
- Failure to object to findings.
- How findings entered.
- Judicial review.
- Equity cases.
- Standard of review.
- Conclusions of law.
- Criminal cases.
- Criminal trials.
- Findings of facts by jury.
- Intent.
- Juvenile proceedings.
- Purpose of rule.
- Stipulations.



This Is A Legally Binding Agreement--Read Carefully Before Signing

EXHIBIT 11

REALTOR®

This AGREEMENT is entered into on this 28th day of February 1991, by and between
Hugh B. Smith (Broker) and Lakae Kunz (Buyer)

1. **RETAINER AGREEMENT.** Buyer hereby retains and authorizes Broker on an exclusive basis to locate and/or negotiate for the purchase, exchange and/or lease of real property of a general nature described below.

2. **RETAINER PERIOD:** This Agreement begins on the date first shown above, and ends on March 15th upon the earlier closing of a property under this Agreement

3. **BROKER'S OBLIGATIONS:** The Broker will. (a) use diligence in locating a property acceptable to Buyer; (b) use professional knowledge and skills to negotiate for the purchase, exchange, lease, or option to purchase the property; (c) assist Buyer throughout the transaction and act in the Buyer's best interest at all times.

4. **BUYER'S OBLIGATIONS:** The Buyer will: (A) work exclusively with Broker for the purchase, exchange and/or lease of a property; (B) furnish Broker with relevant personal and financial information to facilitate Buyer's ability to purchase property; (C) **IN ALL COMMUNICATIONS WITH OTHER REAL ESTATE AGENTS, NOTIFY THE AGENTS THAT BUYER HAS ENTERED INTO THIS BUYER AGENCY CONTRACT WITH BROKER;** (d) disclose to Broker all properties in which Buyer is either negotiating to purchase, exchange and/or lease or has a present interest in purchasing. Those properties are listed as follows:

4916 Emigration
all other properties shown to buyer

5. **COMPENSATION:** (A) Buyer agrees to be responsible for compensation of Broker if, during the term of this Agreement, the Buyer, or any other person acting in the Buyer's behalf, buys, exchanges for, leases, or obtains an option on any real property of the general nature described below. Further, Buyer authorizes Broker to participate in a commission paid by the Seller, the payment of which will be credited toward the Buyer's obligation to pay a commission under this Agreement. The payment of any commission by the Seller from the sales proceeds will not make the Broker either the agent or sub-agent of the Seller

(B) The amount of the compensation shall be the greater of 1) \$2,000, or 2) 5 % of the purchase price of the property, or 3) the amount of any selling commissions paid by the listing brokerage of properties listed for sale. In any event, the compensation shall be paid at closing.

C) Buyer agrees to compensate Broker if Buyer, or any person acting for Buyer or in Buyer's behalf, purchases, exchanges, leases, or obtains an option to purchase within (2) months after termination of this Agreement any real property of the general nature described in paragraph 6, which property Broker has shown or submitted in writing to Buyer during the term of this Agreement.

6. **GENERAL NATURE OF PROPERTY:** (Check applicable)
☒ Residential/Personal ☐ Residential/Investment
☐ Farm ☐ Recreation ☐ Vacant Land
☐ Commercial/Industrial

7 **SPECIAL TERMS AND CONDITIONS:** The following special terms and conditions are made part of this Agreement
none

8 **ATTORNEY'S FEES.** Should any legal action be commenced, involving the rights or duties of either party in connection with this Agreement, the party prevailing in such action shall be entitled, in addition to any other relief, to court costs and actual attorney's fees reasonably incurred in such action, which fees and costs shall be awarded by the court in such action as items of costs

9 **INTERPRETATION.** This Agreement and all provisions thereof shall be interpreted according to the laws of the State of Utah

10 **MODIFICATIONS.** This Agreement shall not be modified or amended except in writing signed by both parties agreeing to such amendment or modification

11 **ENTIRE AGREEMENT.** This Agreement contains the entire agreement between the parties relating to the subject matter of this Agreement, and all prior agreements or representations respecting the subject matter of this Agreement or the rights or duties of either party relating thereto, not expressly set forth in this Agreement, are superseded

12 **AGENCY RELATIONSHIPS:** Broker agrees to act as the agent of Buyer in any resulting transaction. Depending upon the circumstances, it may be necessary or appropriate for Broker to act as agent of both Buyer and Seller, exchange party, or one or more additional parties in any resulting transaction. In such event, Broker will seek Buyer's consent to Broker's representation of additional parties as soon as practicable, or where Broker is the listing Broker on any property in which Buyer is interested Buyer understands that Broker will act as agent of only the Seller with respect to a transaction involving that property, unless Buyer and Seller consent to Broker acting for both as a dual agent

13 **OTHER POTENTIAL BUYERS:** Buyer understands that other potential buyers may consider, make offers on, or purchase through Broker the same or similar properties as Buyer is seeking to acquire. Buyer consents to Broker's representation of such other potential buyers before, during, and after the expiration of this Agreement

14 **EQUAL HOUSING OPPORTUNITY:** Properties will be presented in compliance with federal, state and local anti-discrimination laws

BROKER:

I agree to render services to Buyer on the terms and conditions stated above.

Date: February 28, 1991

COMPANY: SMITH MARKETING GROUP, INC.

Agent: Hugh B. Smith

Broker: Hugh B. Smith

BUYER

I agree to employ Broker on the terms and conditions stated above and acknowledge that I have signed no other similar agreement

Date: 3/2, 1991

Buyer: Lakae Kunz

Buyer: _____

Address: _____ Phone: _____

RECEIPT

I acknowledge receipt of a copy of this document bearing all signatures

Lakae Kunz

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.



GENERAL PROVISIONS (Sections)

INCLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter, fencing, trees and shrubs.

INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, inspection shall be allowed by Seller but arranged for and paid by Buyer.

SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not and will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound and in satisfactory working condition at closing.

CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Hereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and shall encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new lease entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

EARNEST MONEY SALES AGREEMENT

Send Yes(X) No(O)

EARNEST MONEY RECEIPT

DATE: March 2, 1991

The undersigned Buyer LaRae Kunz hereby deposits with Brokerage EARNEST MONEY, the amount of One Thousand Dollars (\$ 1,000.00), in the form of personal check to be deposited upon acceptance by all parties which shall be deposited in accordance with applicable State Law.

Smith Marketing Group, Inc. 566-049 Received by Hy L B Smith
 Brokerage Phone Number

OFFER TO PURCHASE

PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 4916 E. migration in the City of _____ County of Salt Lake, Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section G. Said property is owned by Rob Pease as sellers, and is more particularly described as a 2320 total square foot home on a lot which has 31,350 total square feet

CHECK APPLICABLE BOXES:

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other _____

☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other _____

(a) Included Items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: if refrigerator and all other appliances now in house including hot tub & hot tub equipment

(b) Excluded Items. The following items are specifically excluded from this sale: washing machine & dryer

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:
☒ public sewer ☐ connected ☒ well ☒ connected ☐ other _____ ☒ electricity ☒ connected
☒ septic tank ☒ connected ☐ irrigation water / secondary system ☐ ingress & egress by private easement
☐ other sanitary system _____ ☐ of shares _____ Company _____ ☒ dedicated road ☒ paved
☐ public water ☒ connected ☐ TV antenna ☐ master antenna ☐ prewired ☐ curb and gutter
☐ private water ☒ connected ☒ natural gas ☒ connected ☐ other rights _____

(d) Survey. A certified survey ☐ shall be furnished at the expense of _____ prior to closing. ☐ shall not be furnished.

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1(c) above and below, accepts it in its present physical condition except none

PURCHASE PRICE AND FINANCING. The total purchase price for the property is Twenty Seven Thousand and 000/100 Dollars (\$ 27,000.00) which shall be paid as follows:
THIRTEEN THOUSAND Dollars (\$ 13,000.00) which represents the aforementioned EARNEST MONEY DEPOSIT.
31,350.00 representing the approximate balance of CASH DOWN PAYMENT at closing.
2 representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____ which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other _____
24,500 representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of \$ _____ which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other _____
2 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: as proceeds from the new loan to be secured against subject property by a 1st trust deed & note.
7,000 Other _____
7,000 TOTAL PURCHASE PRICE

Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing. Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within 10 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at interest rate not to exceed 9.5 %. If Buyer does not qualify for the assumption and/or financing within 45 days after Seller's acceptance of this Agreement, this Agreement shall be voidable at the option of the Seller upon written notice. Seller agrees to pay up to 2 N/A mortgage loan discount not to exceed \$ N/A

CONDITION AND CONVEYANCE OF TITLE. Seller represents that Seller covenants title to the property, subject to the contract Transfer of Seller's ownership interest shall be made as set forth in Section S Seller agrees to furnish good and marketable title to the property, subject to the exceptions and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, and an attorney's opinion (See Section H)

INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement.

VESTING OF TITLE. Title shall vest in Buyer as follows Le Roy Kunz

SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted None

Exceptions to the above and Section C shall be limited to the following None

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: Seller agrees to pay Smith Marketing Group, Inc. a commission of 3% of the sales price at closing. The remainder of SMG Fee = commission to be paid by buyer.

CLOSING OF SALE. This Agreement shall be closed on or before April 15, 1991 at a reasonable location to be designated by Buyer, subject to Section Q Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other _____

POSSESSION. Seller shall deliver possession to Buyer on closing date unless extended by written agreement of parties.

1. AGENCY DISCLOSURE. At the signing of this Agreement the listing agent Hugh Smith represents () Seller (☒) Buyer, the selling agent Hugh Smith represents () Seller (☒) Buyer Buyer and Seller confirm that prior to signing this Agreement a disclosure of the agency relationship(s) was provided to him/her. (None) Buyer's initials (None) () Seller's initials. None

1. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

2. AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall accept until 10:00 (AM/PM) March 12, 1991 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

Seller's Signature) (Date) (Address) (Phone) (SSN/TAX ID)

Seller's Signature) (Date) (Address) (Phone) (SSN/TAX ID)

CHECK ONE:

☒ ACCEPTANCE OF OFFER TO PURCHASE: Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

☐ REJECTION: Seller hereby REJECTS the foregoing offer. (Seller's initials)

☐ COUNTER OFFER: Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until _____ (AM/PM) _____, 19____ to accept the terms specified below.

Seller's Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

Seller's Signature) (Date) (Time) (Address) (Phone) (SSN/TAX ID)

CHECK ONE:

☐ ACCEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER

☐ REJECTION. Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's initials)

☐ COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

Buyer's Signature) (Date) (Time) (Buyer's Signature) (Date) (Time)

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed)

A. ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:
SIGNATURE OF SELLER SIGNATURE OF BUYER

Date _____

Date _____

All signatures to be mailed on _____, 19____

4. AUTHORITY OF SIGNATORS. If Buyer or Seller is a corporation, partnership, trust, estate or other entity the person executing this Agreement on its behalf warrants on her authority to do so and to bind Buyer or Seller

5. COMPLETE AGREEMENT — NO ORAL AGREEMENTS This instrument constitutes the entire agreement between the parties and supersedes and cancels any all prior negotiations representations warranties understandings or agreements between the parties There are no oral agreements which modify or affect this agreement This Agreement cannot be changed except by mutual written agreement of the parties

6. COUNTER OFFERS Any counter offer made by Seller or Buyer shall be in writing and if attached hereto, shall incorporate all the provisions of this Agreement expressly modified or excluded therein

7. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages to institute suit to enforce any rights of Seller In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action

8. ABROGATION. Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement

9. RISK OF LOSS. All risk of loss or damage to the property shall be borne by the Seller until closing In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property or to closing or declare this Agreement null and void If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed

10. TIME IS OF ESSENCE—UNAVOIDABLE DELAY. In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, floods, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein Thereafter, time is of the essence This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction

11. CLOSING COSTS. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution Costs of providing title insurance or an abstract brought current shall be paid by Seller Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest assumed obligations shall be prorated as set forth in Section 8 Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing

12. REAL PROPERTY CONVEYANCING. If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, retaining Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein

13. NOTICE. Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required If any such timely required notice is not given, the contingency with respect to which the notice was to be given shall be automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice

14. BROKERAGE. For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office

15. DAYS. For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

GE FOUR OF A FOUR PAGE FORM.